IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.1256 OF 2003

Peter Joseph Bhosale & ors. .. .. Appellants (Org.Plaintiffs)

v/s.

Poona Diocesan Corporation Pvt.Ltd. & ors. .. Respondents

Mr.D.D. Madon i/by Mr.Sanjay Sawant for the Appellants.

None for the Respondents.

CORAM : SMT. ROSHAN DALVI, J.

DATED : 27th June, 2007

ORAL JUDGMENT :

1. The Appellants (original Plaintiffs) have challenged the judgment dated 11.6.2003 of the learned Additional District Judge, Pune, dismissing the Appellants' suit with costs. The Appellants' suit was titled for specific performance an Agreement, for declaration and perpetual injunction. The Appellants prayed for a

mandatory order that the Respondents execute a Sale Deed in favour of them and failing which the Court Commissioner do execute such Sale Deed. The Appellants further prayed for declaration that the Sale Deed executed in favour of Respondent No.6 was void and for an injunction restraining the Respondents from disposing off the suit property. The Agreement of which specific performance was prayed for is stated to be dated 9th October 1962 entered into by the Appellants with Respondent No.5, who was the priest of the church, which was to be constructed on the suit land as per the agreement. The agreement was oral.

2. It is the Appellants' (original Plaintiffs') case that under that oral agreement, Rs.30,000/- were paid on 9.10.1962 by the Appellants to Respondent No.5, which was receipted by Respondent No.5 on 9.10.1962 itself. Respondent No.5 thereafter executed an Affidavit on 7.4.1969, confirming the said agreement

orally entered into on 9.10.1962 and the payment of Rs.30,000/- made to him.

3. The Appellants have sued for specific performance of the oral Agreement dated 9.10.1962. The suit was filed in 1987. It is the case of the Appellants that the church was to be put up on the suit premises within 10 years and if that was not constructed, the land was to revert to the Appellants. The church was not constructed. The Appellants' suit is for specific performance of the agreement. They claim that they should be conveyed the property agreed to be sold to Respondent No.5. They do not claim refund of the consideration paid. The entire case of the Appellants is inexplicable. If they agreed to sell the property, they are deemed to be the owners thereof. By a mere agreement to sell, the ownership rights are not transferred or divested. In that case, no conveyance or re-conveyance to the Appellants is required. If the Appellants were not the owners, they could not have

agreed to sell the suit property (which belonged to another), to Respondent No.5 or any other. In such case, conveyance cannot be executed by Respondent No.5 in favour of the Appellants and no title can pass. Even if, the Appellants could enforce specific performance of the oral agreement executed in 1962, and even considering that the period of 10 years for the construction of the church property was allowed to expire, after which the Appellants wanted the property to be conveyed to them, that right accrued to the Appellants in 1972. It is the case of the Appellants that thereafter there were discussions between the parties. The application for permission to sue was filed before the Charity Commissioner (since the property was to be used for a public trust) in 1983.

4. The Appellants claim that the period of limitation got saved by earlier proceedings and the applications so made. That contention is incorrect. A suit for specific performance of an agreement to sell is required to be

filed within 3 years of the agreement, having been executed. The Appellants' suit is titled as the suit for specific performance of the agreement and for declaration and for perpetual injunction. No injunction can be obtained after such period also under the specific bar created by Section 41(e) of the Specific Relief Act.

5. It is the case of the Appellants in Para-7 of the Plaint that there was an oral agreement between the Appellants and Respondent No.1-Trust entered into on 22.11.1964, under which the Appellants were to pay Rs.30,000/- for the purchase of the suit property and Respondent Nos.1 and 5 were to add Rs.15,000/- to such purchase and purchase the property in the name of Respondent No.1. A church was to be constructed on the property and if not constructed, the Appellants would pay Rs.15,000/- to Respondent Nos.1 and 5 and demand re-conveyance.

6. The oral agreement, therefore, is ambiguous and nebulous. It is not an agreement for purchase of a property for a specified sum. The agreement set out in the plaint relates to a contingency. The agreement does not show within which period the church was required to be constructed.

7. The evidence on behalf of the Appellants shows that in the year 1962 (and not on 22.11.1964) Respondent No.5 agreed to sell the suit property to the 1st Appellant's father for Rs.45,000/- . The 1st Appellant's father paid Rs.30,000/- as part consideration. Appellant No.1's father was already in possession of the property. It was agreed that Respondent No.1 should construct the church on the suit property within a period of 10 years from the date of the agreement and if the church is not constructed, the property should be sold to the father of Appellant No.1, upon the payment of balance consideration of Rs.15,000/- by the father of Appellant No.1. The

Appellants have produced the original receipt of Rs.30,000/- which is marked as Article-A. A copy of the Deed of Agreement executed by Respondent No.5 in favour of the father of Appellant No.1 is shown to be produced at Article A-1. The Appellants have not been able to show that agreement, though the entire other record is produced before this Court.

8. The evidence further shows the Affidavit dated 7.4.1969, confirming the execution of the Deed of Agreement, which is marked as Article A-2. The said affidavit shows the Appellants as Party No.1 and Respondent No.5 as party No.2. It refers to an Agreement dated 22.11.1964 as per the seminal case of the Appellants in para-7 of their Plaint. It refers to the two amounts of Rs.15,000/- and Rs.30,000/-, showing that only part payment was made in a sum of Rs.30,000/-. It further shows that Respondent No.5 had paid Rs.15,000/- and purchased the suit property for Respondent No.1-Trust. The affidavit executed in

1969 makes no reference to the further amount of Rs.15,000/- which are claimed by the Appellants to be payable by them after part consideration of Rs.30,000/- was paid.

9. The Appellants have applied for specific performance of the Agreement dated 22.11.1964 in the plaint. No such agreement is produced in the evidence. A deed of agreement, of which a mention is made in para-5 of the evidence of the Appellants is not shown. The affidavit refers to an Agreement dated 9th October 1962 (and not 22.11.1964). The Appellants' case is not based upon that agreement.

10. The Appellants' case is, therefore, based upon an oral Agreement dated 22.11.1964, no other agreement having been shown to be produced. The Appellants' Advocate argued that though the deed of agreement was produced as Article A-1, the learned Judge has not referred to the same. The Appellants have been unable to produce that agreement even before this Court. The

affidavit, which has been produced as Article A-2, makes no reference to another Agreement dated 22.11.1964. The Agreement dated 22.11.1964 is not even annexed to the plaint.

11. The learned Judge has, therefore, rightly concluded that aside from the bare words of the Plaintiffs, there is nothing to show that the agreement was executed by and between the parties, which the Plaintiffs seek to specifically enforce. Since the receipt of Rs.30,000/- is issued on 9.10.1962 and the Appellants claim that the agreement had been entered into on 22.11.1964, the receipt of Rs.30,000/- is also not seen to be showing the part consideration paid for the agreement which was sought to be specifically enforced. Further, the Affidavit dated 7.4.1969 also does not relate to the Agreement dated 22.11.1964, which was sought to be enforced and hence, cannot be taken as the corroborating fact of the execution of the Agreement dated 22.11.1964. It is seen that because the affidavit,

Ex.A2, makes a reference to an oral agreement of 1962, and the receipt is dated 9.10.1962, the Appellants' claim specific performance of that agreement, though that has not been their case in the Plaint.

12. It is a settled position in law that remedy of specific performance is discretionary. The specific performance of an ambiguous agreement cannot be granted upon the bare words of the Appellants. In fact, the other witness examined on behalf of the Appellants has deposed that he does not know anything about the suit land, except for the fact that he knows the bungalow where Appellant No.1 was residing since he used to perform pooja in the said bungalow.

13. Since the main relief sought for by the Appellants in their Plaint cannot be granted, the ancillary reliefs also cannot be granted. The suit is seen to be hopelessly barred by the Law of Limitation. The Appellants have not sought to enforce their oral Agreement dated

9.10.1962 or 22.11.1964 within 3 years of the execution of any such oral agreement.

14. Under Article 54 of the Limitation Act, the period of limitation for suit for specific performance is 3 years from the date fixed for the performance of the contract and if no date is fixed from the date when the Plaintiff has notice that performance is refused. The Appellants have not shown when they claimed specific performance of their oral agreement and when it was refused. It is contended that in 1983 they came to learn that Respondent No.5 on behalf of Respondent No.1, was to sell the property to a third party. Hence, they applied in the office of the Charity Commissioner for permission to sue for specific performance of the suit property. They sued after the permission was received. The suit itself is filed after four years of the application made. There is absolutely no substance in the Appeal.

15. Appeal is dismissed. No order as to costs. The interim order dated 8.3.2007 shall continue for four weeks.

(SMT. ROSHAN DALVI, J.)